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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CHARLES Z. CHOU,

Plaintiff and Appellant,

v.

FREDERIC BISHOP,

Defendant and Respondent.

A097312

(San Francisco County
Super. Ct. No. 312937)

Charles Z. Chou appeals from a judgment following a court trial of his complaint for breach of contract and fraud against Frederic Bishop, doing business as American Display & Fabrication. We conclude that substantial evidence supports the trial court's determination that there was no breach of contract or fraud, and that Bishop was not required to have a contractor's license.

BACKGROUND

Chou was improving residential property that he owned in San Francisco. He hired Henry Huang, a licensed general contractor for the project. Their contract included Huang's contractor's license number, described Huang as a contractor and stated that Huang would install all stainless steel items supplied by Chou.

Chou got a quote from B. Metal Fabrication (B. Metal) for stainless steel sliding doors, staircase rails, a fireplace, kitchen counter tops and other stainless steel items for the home. B. Metal's estimate was \$27,000, including the cost of installation. Chou found Bishop's firm in the yellow pages under either "welder" or "metal fabricator," and

faxed the B. Metal estimate to Bishop for a second bid. Bishop's bid was \$10,000 less than the B. Metal bid because Bishop did not include installation charges.

Bishop, who normally used purchase orders and not contracts, told David Myers, who was working in Bishop's office at the time, that he needed a contract form for Chou's job. Myers called a contractor friend and obtained a form of contract on a computer disk. Myers then substituted Bishop's business name in place of the contractor's name at various locations in the form.

In May of 1999, Chou and Bishop signed the contract Myers had prepared. As signed by Chou and Bishop, the contract stated: "American Display & Fabrication will furnish all labor and materials to construct and complete in a good, workmanlike and substantial manner . . . Custom Stainless steel Work" Payment of \$17,350 was provided for as follows: "50% down & 25% when Work is delivered, 25% Remainder when work is completed." The time of performance was stated as: "Within 30 days after execution of this agreement, customer will have the job ready for [sic] as [¶] Agreed before commencement of work, and shall thereafter give American Display written notice to commence work. American Display shall commence work within 10 days after such notice and shall complete the same within 30 working days after Commencement, subject to permissible delays as described in 6 of Terms and Conditions."¹ On May 27, 1999, Chou paid Bishop half of the contract price.

There were delays and problems fitting the stainless steel materials in the house. Each party blamed the other, or third parties, for the problems. At some point, Chou contacted the state contractor's license board and complained about Bishop. In

¹ There was no contractor's license number on the contract. There was a sentence at the bottom of the contract that stated: "Contractors are required by law to be licensed and regulated by the Contractors' state license board any questions concerning a contractor may be referred to the registrar of board of contractors' state license board, 3132 Bradshaw road [sic], Sacramento, Ca. 95827." Although various boilerplate clauses were included on a second page of the contract, there was no integration clause.

November of 1999, Bishop sent Chou a telegram stating that the work was ready for delivery and requested payment. Bishop testified that when he first attempted delivery, Chou sent the materials back for additional polishing. According to Bishop, the second time he went to the house, Chou demanded that Bishop install the items and refused to pay. Bishop stated that he eventually offered to have general contractor Michael Murphy assist in fitting the items into the house. Murphy also testified that Bishop asked him to do the installation.² Chou did not pay the balance due under the contract.

Chou filed a complaint for breach of contract, fraud and rescission, requesting damages of \$50,000, punitive damages of \$25,000 and attorney fees. The testimony was conflicting, with Chou testifying that Bishop represented himself as a contractor and agreed to install the items, and Bishop denying those facts.

Bishop testified that he had been engaged in the metal fabrication business for approximately 20 years. His business entailed constructing items out of metal from blueprints supplied by customers. He never had a contractor's license because he did not install the items he fabricated. In the rare situation that a customer requested installation, Murphy would do the installation work.

Murphy testified that he is a licensed general contractor and had worked with Bishop in the past. Murphy knew that Bishop did not do installation, but was a metal fabricator. There were no faults in Bishop's work for Chou, but the fact that the walls in the house were not square necessitated adjustments to make things fit properly.

The trial court issued a detailed statement of decision, concluding Bishop did not misrepresent himself as a licensed contractor, that the contract did not include installation, and that Bishop was exempt from state licensing requirements. Judgment was entered ordering that Chou take nothing from Bishop. An order was entered granting

² At oral argument, appellant again disputed these facts. Whether a witness is truthful or lying is determined by the trial judge who is in the best position to evaluate the quality and character of the testimony.

Bishop's motion for costs and attorneys' fees according to the contract. Chou appealed from the judgment and order.

DISCUSSION

Chou argues that the trial court misinterpreted Bishop's obligations under the contract, ignored Chou's evidence that Bishop misrepresented himself as a licensed contractor, erred in ruling that Bishop made a full delivery under the contract terms, and misapplied an exemption in the contractor's licensing law. Chou's arguments reflect his lack of understanding of the substantial evidence rule on appeal. The legal and factual components of the trial court's detailed nine-page statement of decision were supported by substantial evidence.

When the parties to a contract introduce conflicting evidence to support their interpretation of uncertain language, the issue presented is one of fact, to be determined by the trial court's observations and conclusions regarding credibility of witnesses. (*Abbate v. County of Santa Clara* (2001) 91 Cal.App.4th 1231, 1239; *De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 505.)

We are bound by a rule of appellate review that requires that “ ‘[a]ll conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict if possible.’ ” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) “Moreover, so long as the trier of fact does not act arbitrarily and has a rational ground for doing so, it may reject the testimony of a witness even though the witness is uncontradicted. [Citation.] Consequently, the testimony of a witness which has been rejected by the trier of fact cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved. [Citation.]” (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.) An appellate court will not upset the trial court's rulings when they are supported by substantial evidence. This rule is particularly applicable when the trial court has passed on disputed factual matters. (*Morgan v. Community Redevelopment Agency* (1991) 231 Cal.App.3d 243, 262.)

Chou concedes that the evidence regarding the meaning and performance of the contract was sharply conflicting. On appeal, he reargues the points he asserted before the trial court, ignoring the substantial evidence produced by Bishop that supports the trial court's decision.

Chou argues that his contract with Bishop called for Bishop to "construct" and "complete" the work. He interprets these words to mean "fabricate" and "install." However, the contract, a document based on another form with language added on the computer, was ambiguous. The trial court heard testimony on how the contract was drafted, as well as testimony from contractors who had worked with Bishop and knew his practices. That evidence showed that the large discrepancy between Bishop's bid and the bid of B. Metal reflected the fact that Bishop would not install the work. In addition, Chou's own contract with his general contractor expressly stated that the general contractor would install all stainless steel items.

Bishop testified that he believed that Chou's general contractor would be installing the items. He was unable to communicate directly with the contractor, who did not speak English. Bishop did tell Chou and his architect that he would not install the work. In the end, the trial court believed Bishop's evidence and did not believe Chou's evidence. As an appellate court, we will not disturb findings supported by substantial evidence.

Chou argues that Bishop misrepresented himself as a licensed contractor. Again, the court believed the testimony of Bishop and Murphy that Bishop did not install the materials he fabricated and did not represent himself as a licensed contractor. The court did not believe Chou's testimony that Bishop said he was licensed, and found inconsistent statements in Chou's own deposition testimony. In the case of contradictory testimony, we accept the trial court's resolution of the conflict when it is supported by substantial evidence.

Chou also disputes whether Bishop made a full delivery according to the contract. He argues that delivery was late and Bishop never mentioned money after he took the parts back to do additional polishing requested by Chou. However, Chou waived strict

adherence to any deadlines by repeatedly agreeing to delays in performance. The court decided that Bishop's delivery was ultimately rejected by Chou's demand that Bishop install the materials. This determination is supported by the evidence produced by Bishop.

Chou's final argument is that the court improperly applied an exemption in the Business and Professions Code regarding contractor's licenses.³ A contractor is: "Any person . . . or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building or home improvement project, or part thereof." (§ 7026.1, subd. (b).) A home improvement contractor is: "a contractor as defined and licensed under this chapter who is engaged in the business of home improvement" (§ 7150.1.)

Section 7045 exempts from the licensing requirement: "the sale or installation of any finished products, materials, or articles of merchandise that do not become a fixed part of the structure," and "a material supplier or manufacturer furnishing finished products . . . who does not install or contract for the installation of those items." (Bus. & Prof. Code, § 7045.) The evidence supports the trial court's conclusion that Bishop was a manufacturer of finished products who did not install the items and properly came within the exemption.

Chou takes issue with the court's reliance on *Walker v. Thornsberry* (1979) 97 Cal.App.3d 842 and *E. A. Davis & Co. v. Richards* (1953) 120 Cal.App.2d 237, arguing that those cases involved a commercial product and products that did not become a part of the structure. The court properly relied on the cited cases.

The *Walker* case is particularly applicable. In *Walker*, the product supplied by the manufacturer was a prefabricated metal restroom. The product was delivered to the jobsite in pieces that were bolted together and attached to a concrete foundation by employees of the manufacturer. The issue was whether the exemption of section 7045

³ All statutory references are to the Business and Professions Code.

applied to finished products even though substantial on-site work was conducted. The court noted that the manufacturer did not install the concrete foundation, rough plumbing or plumbing fixtures, stalls, roofing or painting. Because the manufacturer's employees only assembled the pieces and bolted the structure to the foundation, the court reasoned that their labor was merely incidental and that the activity was within the exemption of section 7045. (*Id.* at p. 847.)

Similarly, in *E. A. Davis & Co. v. Richards, supra*, 120 Cal.App.2d 237, the court found that the supplier was exempt from the licensing requirement of section 7045 because he supplied a patented prefabricated kitchen cabinet unit. The court stated that the product "was not actually fabricated into nor did it become a permanent, fixed part of the structure." (120 Cal.App.2d at p. 240.)

Bishop did not do any installation work. As the trial court noted, even Murphy's work was minor, or incidental, consisting of adjusting temporary bolts to hold the stair rail in place. Bishop, a metal fabricator, was not required to be licensed as a contractor.

The trial court's decision is supported by substantial evidence.

DISPOSITION

The judgment and order appealed from are affirmed.⁴

Marchiano, P.J.

We concur:

Stein, J.

Margulies, J.

⁴ The notice of appeal refers to the judgment and to an order for costs and attorneys' fees entered on December 6, 2001. Aside from arguing that Bishop is not the prevailing party because he was not licensed, appellant has raised no issue on appeal regarding the postjudgment order for costs and fees.